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## The Autonomous Global Corporation: On the Role of Organizational Law beyond Asset Partitioning and Legal Personality

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# THE AUTONOMOUS GLOBAL CORPORATION: ON THE ROLE OF ORGANIZATIONAL LAW BEYOND ASSET PARTITIONING AND LEGAL PERSONALITY

Larry Catá Backer\*

## I. INTRODUCTION

What is the essential role of the law of economic organizations?<sup>1</sup> A definitive answer to this simple question has proven to be elusive. In the last century, the debate was framed in terms of the relationship of law to corporate personality:

There is a vast literature, with deep roots in nineteenth-century German scholarship, on the nature of juridical persons. The debate over competing conceptions of juridical persons that is the central preoccupation of that literature still shows some life today, in terms not much removed from those of a century ago. . . . [T]he traditional literature is principally concerned with questions—such as the power of the state versus the power of private organizations, or the nature of group will.<sup>2</sup>

At the core of the “juridical personality” debate were two basically incompatible views, each held by a different camp, of the critical nature of economic organizations. For one camp, economic organizations were property in the hands of their owners. This property might be given special qualities by the state or through contract, but it remained property all the same.<sup>3</sup> It followed from this conceptual framework that the role of law was to focus on the interests of the owners or, more generally, those with an ownership

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1. Economic organizations include—in addition to corporations, partnerships, and other formally constituted collectives—a number of new forms of collective economic activity. These new forms include networks and other informal aggregations of economic activity. See Gunther Teubner, *The Many-Headed Hydra: Networks as Higher-Order Collective Actors*, in *Corporate Control and Accountability: Changing Structures and the Dynamics of Regulation* 41 (Joseph McCahery, Sol Picciotto & Colin Scott eds., Clarendon Press 1993).

2. Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 Yale L.J. 387, 438–39 (2000) (footnote omitted); see also Michael J. Phillips, *Reappraising the Real Entity Theory of the Corporation*, 21 Fla. St. U. L. Rev. 1061 (1994).

3. See e.g. Victor Morawetz, *A Treatise on the Law of Private Corporations Other Than Charitable* 2 (Little, Brown & Co. 1882) (arguing that the existence of a corporation independent of its owners was fiction, namely “the rights and duties of an incorporated association are in reality the rights and duties of the persons who compose it, and not of an imaginary being”); I. Maurice Wormser, *Disregard of the Corporate Fiction and Allied Corporation Problems* 8 (Baker, Voorhis & Co. 1927) (“A reality the corporation is. A personality the corporation is not.”).

interest or stake in the entity.<sup>4</sup> For the other camp, the economic organization, like a pallid reflection of the political state that gave it existence, constituted an autonomous institutional actor separable from those with an interest in it.<sup>5</sup> From this framework, the role of law should focus on the entity—that is, on the collective interests constituting the entity rather than on the aggregate individual interests of stakeholders, however defined.<sup>6</sup>

The last half of the twentieth century witnessed the revitalization of this debate, now heavily infused with notions borrowed from economics.<sup>7</sup> For these scholars, the issues of institutional personality were tangential and largely irrelevant to the foundational realities of institutional functioning. The focus of these explorations was on the role of economic institutions as a nexus point for the interests of others.<sup>8</sup> In a variety of substantially more sophisticated methods that deepened the insights of economic-organization-as-property proponents of the earlier debate,<sup>9</sup> this scholarship focused on the role of law as a facilitator of natural profit-maximizing behavior among the actors pooling resources within an organization.<sup>10</sup> Recent scholarship has suggested the connection between the two camps and the critical role that economic culture plays in the social acceptance of institutional personality.<sup>11</sup> The great insight of this scholarship has been to see in Japanese economic institutional culture evidence of the possibility that a corporation can own itself and thus become a self-determining subject.<sup>12</sup>

Another strain of recent economic-organization-as-nexus-of-contract scholarship has focused on the singular characteristic of limited liability as a basis for understanding the role of regulation of economic enterprises. This scholarship, too, views institutional

4. The debate over the nature and extent of the actors whose interests ought to be protected is extensive, protracted, and unresolved. The class of actors whose interests or “stakes” in the enterprise ought to be protected range from shareholders to virtually any person or entity affected by enterprise activity. Compare e.g. Milton Friedman, *Capitalism and Freedom* 133–34 (U. Chi. Press 1962) with e.g. Robert A. Dahl, *After the Revolution? Authority in a Good Society* 80–87, 100–02 (rev. ed., Yale U. Press 1990).

5. German academic theory developed this idea to its highest form. See Otto Gierke, *Political Theories of the Middle Age* (Frederic William Maitland trans., Beacon Press 1958); Gunther Teubner, *Enterprise Corporatism: New Industrial Policy and the “Essence” of the Legal Person*, 36 Am. J. Comp. L. 130 (1988). American courts and scholars for the most part tended to avoid the extreme. For a discussion of the American perspective, see Phillip I. Blumberg, *The Multinational Challenge to Corporation Law: The Search for a New Corporate Personality* 21–51 (Oxford U. Press 1993).

6. Phillips, *supra* n. 2, at 1097.

7. See e.g. Frank H. Easterbrook & Daniel R. Fischel, *The Economic Structure of Corporate Law* (Harv. U. Press 1991). For a discussion of the power of this discourse in the United States, see David Sciulli, *Corporate Power in Civil Society: An Application of Societal Constitutionalism* 61–128 (NYU Press 2001).

8. Among the mountain of writings on this point, see e.g. William W. Bratton, Jr., *The “Nexus of Contracts” Corporation: A Critical Appraisal*, 74 Cornell L. Rev. 407 (1989).

9. See e.g. Bernard Black & Reinier Kraakman, *A Self-Enforcing Model of Corporate Law*, 109 Harv. L. Rev. 1911 (1996).

10. For an example of an early but influential work, see Ralph K. Winter, *Government and the Corporation* (Am. Enter. Inst. for Pub. Policy Research 1978).

11. See Katsuhito Iwai, *Persons, Things and Corporations: The Corporate Personality Controversy and Comparative Corporate Governance*, 47 Am. J. Comp. L. 583, 594 (1999) (comparing the consequences of corporate personality cultures in Japan and the United States to examine the ways in which it is possible “to eliminate either personality or thingness from the person-cum thing corporation, thereby turning it into a mere ‘legal thing’ or a full ‘legal person,’ respectively”).

12. *Id.* at 597–600. Iwai notes that the possibility of self-ownership is possible even under regimes that prevent corporations from exercising the rights of a shareholder with respect to its own shares. All that is required is for a group of corporations to own a majority of each other’s shares as a group. See also Meir Dan-Cohen, *Rights, Persons, and Organizations: A Legal Theory for Bureaucratic Society* (U. Cal. Press 1986) (noting the possibility of a personless or ownerless corporation).

concerns as largely tangential to the appropriate focus. Henry Hansmann and Reinier Kraakman recently argued “the essential role of all forms of organizational law is to provide for the creation of a pattern of creditors’ rights—a form of ‘asset partitioning’—that could not practicably be established otherwise.”<sup>13</sup> Organizational law creates dedicated pools of assets in a much more efficient and cost-effective manner than other areas of the law, particularly those of contracts, property, and security interests.<sup>14</sup> Asset partitioning protects the assets of an owner of a legal entity from the entity’s creditors and, more importantly, protects the entity’s assets from its owner’s personal creditors.<sup>15</sup> For Hansmann and Kraakman, the focus on the legal regulation of asset segregation offers “a definition of juridical persons that is simpler, clearer, and more functional than those that have characterized the traditional literature. Indeed, one reason we have used the term ‘legal entity’ rather than ‘juridical person’ is to avoid confusion between our analysis and the more traditional views.”<sup>16</sup>

For all their utility, these approaches to the relationship of law and economic entities are limited by different sets of analytical constraints. The corporate personality debate has focused on the relationship between entity and owner. The economic-entity-as-nexus-of-contract debate has focused on the relationship between aggregations of capital and stakeholders. Implicit in these analyses is the idea that law is an exogenous force that regulates the relationship between entity and shareholder in the one case and entity and creditor in the other.

This critical, but limiting, assumption actually consolidates two related principles. The first is the territorial principle. This principle is predicated on the idea that economic entities are wholly regulated within a single territory. The second is the principle of hierarchy of regulatory authority. In these analyses, this principle is expressed as an assumption that every political community has regulatory power independent of and superior to the power of the entity regulated or the individuals who have aggregated resources. Combining the two principles produces a set of limitations on the ways in which people, capital, stakeholders, and the enterprise relate to and can be affected by law. In its most essential form, it suggests a classical model in which political states form closed regulatory systems subject to an exclusive regulation by a set of singular political institutions superior in power to and separable from the people and things these political institutions regulate.

The emerging patterns of economic globalization<sup>17</sup> may expose the limitations of theorizing that is grounded on these principles. The rise of multinational enterprises<sup>18</sup>

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13. Hansmann & Kraakman, *supra* n. 2, at 390 (footnote omitted).

14. *Id.*

15. *Id.*

16. *Id.* at 439.

17. See Manfred B. Steger, *Globalism: The New Market Ideology* (Bowman & Littlefield Publishers, Inc. 2002). For a critical analysis of economic globalization, see Joseph E. Stiglitz, *Globalization and Its Discontents* (W.W. Norton & Co. 2002).

18. The definition of such enterprises is unsettled. See Peter T. Muchlinski, *Multinational Enterprises and the Law* 61–80 (Blackwell Publishers 1999). The Organisation for Economic Co-operation and Development (“OECD”) has used a loose definition that will serve for purposes of this article. See OECD, *OECD Guidelines for Multinational Enterprises: Revision 2000*, <http://www.oecd.org/dataoecd/56/36/1922428.pdf> (accessed June 25, 2006) [hereinafter OECD, *Guidelines*]. The OECD defines such enterprises as:

suggests the old assumptions about state monopolies on lawmaking and on the hierarchy of that law, and regulatory authority may no longer be useful as a limiting parameter for analysis.<sup>19</sup> The character of law as an exogenous force is increasingly belied by an emerging global economic system in which many have suggested “no one is in charge.”<sup>20</sup> In a globalizing world, the territorial principle produces a perverse effect—limiting, rather than expanding, the importance of law as a force in the regulation of economic enterprises or of those with an interest in them. Likewise, globalization limits the value of traditional legal hierarchy as a descriptive or predictive tool. It is increasingly replaced by a principle of hierarchy of authority that suggests the state may not be the ultimate source for either law or coercion of behavior—transnational or international systems may now or in the future rise to supplant the state as the regulatory nexus point with multinational economic enterprises.

This is not to suggest that the insights of the older analyses have lost all value. Quite the opposite—the insights of academics like Katsuhito Iwai, Hansmann, and Kraakman are not merely important within the context in which they were written, but may now serve as the means for beginning an exploration of a larger puzzle. Hansmann and Kraakman’s insights on “asset partitioning” and Iwai’s insights about capitalist models and their effects on the character of economic enterprises suggest important insights on the problem of the multinational corporation and its regulatory nexus. Those insights, when combined with those of the territorial principle and the principle of hierarchy of regulatory authority, and understood in a context of economic globalization, provide a more useful framework for examining what may be the central issue of enterprise regulation—global institutional autonomy.

This article serves as an introduction to the construction of a theory of institutional autonomy from a century of debate about the nature of economic entities. Part II re-examines the asset partitioning ideas of Hansmann and Kraakman in the context of the multinational enterprise. It suggests that asset partitioning can be usefully understood as fleshing out the contours of the way in which organizational law shapes *enterprise autonomy for creditors*. Part III re-examines the corporate personality analysis of Iwai in a global context to suggest the possibility of *enterprise autonomy from shareholders*. Part IV considers the perverse utility of the ancient territorial principle and the principle of regulatory hierarchy in their global context to suggest the possibility of *enterprise autonomy from the state*. Putting these puzzle pieces together, the article concludes with the suggestion that the nexus of multinational enterprises and globalization provides a

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[E]ntities established in more than one country and so linked that they may co-ordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another. Ownership may be private, state or mixed.

*Id.* at 17–18.

19. See Larry Catá Backer, *Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law*, 37 Colum. Hum. Rights L. Rev. 287 (2006).

20. Thomas Friedman, *The Lexus and the Olive Tree* 112 (Anchor Bks. 2000) (emphasis omitted).

foundation for the emergence of self-conscious, autonomous, self-regulating economic enterprises.

## II. ASSET PARTITIONING AND BEYOND

Hansmann and Kraakman have sought to find in asset partitioning the object of organizational law. They start by evaluating business entities, particularly corporations, as a metaphorical and literal nexus of contracts.<sup>21</sup> A firm must possess two qualities to act successfully as such a nexus: “well-defined decision making authority” and the ability “to provide assurance that the firm will perform its contractual obligations.”<sup>22</sup> Firms satisfy the latter requirement by creating a distinct pool of assets that is separate and protected from the personal creditors of the firm’s owners.<sup>23</sup> To be recognized as effective legal entities, firms must possess these characteristics, which are inherent to individuals.<sup>24</sup> The authors argue that the defining characteristic of these legal entities and, thus, contract law is the partitioning “of assets in which creditors of the firm itself have a prior security interest.”<sup>25</sup> This asset partitioning provides “important efficiency advantages in the creation of large firms that . . . would generally be infeasible . . . without organizational law,” and the ability to partition assets “is the only essential contribution that organizational law makes to commercial activity.”<sup>26</sup> The defining feature of a firm is its ability to separate the assets of the firm and the personal assets of the firm’s managers.<sup>27</sup>

“Asset partitioning has two [essential] components.”<sup>28</sup> First, a pool of assets that is distinct from the personal assets of the firm’s owners and managers must be created.<sup>29</sup> Second, a priority of creditors within these distinct pools of assets must be assigned.<sup>30</sup> Within the second component of asset partitioning, two separate forms of asset partitioning arise.<sup>31</sup> Hansmann and Kraakman term the first form of asset partitioning “‘affirmative’ asset partitioning,” and it is this form that is the most important function of organizational law.<sup>32</sup> Affirmative asset partitioning involves assigning “to the firm’s creditors a claim on the assets associated with the firm’s operations that is prior to the claims of the personal creditors of the firm’s owners.”<sup>33</sup> The “affirmative asset partitioning that we see in the business corporation can be termed ‘priority with liquidation protection,’” which assigns the corporation’s creditors prior claim on corporate assets and protects the corporation from forced liquidation if a shareholder

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21. Hansmann & Kraakman, *supra* n. 2, at 391.

22. *Id.* at 392.

23. *Id.*

24. *Id.*

25. *Id.* at 393.

26. Hansmann & Kraakman, *supra* n. 2, at 393 (emphasis omitted).

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. Hansmann & Kraakman, *supra* n. 2, at 393.

32. *Id.*

33. *Id.*

becomes insolvent.<sup>34</sup> There are weaker forms of asset partitioning, such as that found in general partnerships, in which a creditor can force liquidation.<sup>35</sup> Other legal entities, such as trusts, provide for even stronger forms of affirmative asset partitioning.<sup>36</sup>

Hansmann and Kraakman fold traditional notions of limited liability into what they describe as “defensive asset partitioning,” also known as traditional limited liability.<sup>37</sup> Defensive asset partitioning involves “granting to the owners’ personal creditors a claim on the owners’ separate personal assets that is prior to the claims of the firm’s creditors.”<sup>38</sup> There are several levels of defensive asset partitioning—some strong, some weak.<sup>39</sup> The strongest type is the standard business corporation, in which the “creditors of the firm have no claim at all upon the personal assets of the firm’s shareholders.”<sup>40</sup> A weaker form would, again, be the general partnership, in which “partnership creditors share equally with the creditors of the individual partners [when either becomes] insolvent.”<sup>41</sup>

Turning back to affirmative asset partitioning, Hansmann and Kraakman enumerate a number of benefits that arise from organizational law’s ability to shield the assets of a firm from the personal creditors of individual owners.<sup>42</sup> First, affirmative asset partitioning reduces monitoring costs and lowers the cost of business contracting by allowing owners to subpartition assets within a corporation through the creation of subsidiaries.<sup>43</sup> The authors discuss two hypothetical scenarios: (1) two different types of businesses are held as two operating divisions of one corporation, and (2) the same two businesses organized as two separate corporations under one parent holding company.<sup>44</sup> Because these two businesses rely on two very different groups of creditors, the second scenario will be preferable for a number of reasons.<sup>45</sup> First, the creditors, who are only familiar with Business A, do not have to concern themselves about Business B.<sup>46</sup> Second, unexpected developments in one business will not negatively affect the other.<sup>47</sup> The authors concede that there are extra costs to subincorporation; for example, formal bankruptcy proceedings are more likely to arise as asset pools become smaller.<sup>48</sup> Also, the risk of potential opportunism by the debtor increases.<sup>49</sup> The cost of credit to these businesses will only be reduced if the benefits outweigh the above costs.<sup>50</sup>

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34. *Id.* at 394.

35. *Id.*

36. Hansmann & Kraakman, *supra* n. 2, at 395.

37. *Id.*

38. *Id.* at 393.

39. *Id.* at 395.

40. *Id.*

41. Hansmann & Kraakman, *supra* n. 2, at 395–96.

42. *Id.* at 398.

43. *Id.*

44. *Id.*

45. *Id.*

46. Hansmann & Kraakman, *supra* n. 2, at 400.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 401.

Next, Hansmann and Kraakman posit that affirmative asset partitioning reduces costs because it “eliminates much of the risk that a firm’s finances will be affected by unrelated changes in the personal and business affairs of its owners.”<sup>51</sup> Asset partitioning becomes more important when a firm has numerous owners, as is the case with large-scale, publicly traded corporations.<sup>52</sup> Without affirmative asset partitioning, a firm’s creditors would need to monitor not only the corporation’s credit-worthiness but also the financial stability of each of the firm’s individual stockholders.<sup>53</sup> Moreover, each individual owner would bear the cost and effort of monitoring every other owner’s personal financial situation because they ultimately bear the cost of the firm’s credit.<sup>54</sup> Organizational law creates a default rule that eliminates these extra monitoring costs, thus making the cost of credit much lower.<sup>55</sup>

Additionally, affirmative asset partitioning offers protection for the firm’s creditors and owners from the possibility of liquidation by the personal creditors of the firm’s owners.<sup>56</sup> Strong form asset partitioning, in particular, lowers monitoring costs because creditors and owners do not have to monitor the affairs of every shareholder in fear of liquidation.<sup>57</sup> Affirmative asset partitioning also effectively allocates any risk to owners and creditors in proportion to their costs of bearing the risk.<sup>58</sup>

Using this normative construct, Hansmann and Kraakman analyze whether it would be feasible to construct various forms of business models without using organizational law.<sup>59</sup> Beginning with single owner businesses, the authors note that organizational law would allow an individual to partition his personal assets from those of the business, and vice versa, quite easily.<sup>60</sup> First, the authors analyze whether the individual could effectively obtain asset partitioning through contract.<sup>61</sup> While asset partitioning may be technically possible, the transaction costs would be tremendous because the individual would have to contract with each and every past, present, and future personal and business creditor to ensure that one set of assets would not be available to a different set of creditors.<sup>62</sup> The virtual impossibility of obtaining these guarantees would create a “moral hazard” in which the individual is motivated to avoid subordination agreements, especially where the agreements would be most significant to the creditors of the business.<sup>63</sup> “By failing to obtain a subordination agreement with a personal creditor, the entrepreneur and the personal creditor can externalize to the entrepreneur’s business creditors a larger portion of the potential costs of the

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51. Hansmann & Kraakman, *supra* n. 2, at 403.

52. *Id.*

53. *Id.* at 402.

54. *Id.* at 402–03.

55. *Id.* at 401.

56. Hansmann & Kraakman, *supra* n. 2, at 403.

57. *Id.* at 404.

58. *Id.*

59. *Id.* at 406.

60. *Id.*

61. Hansmann & Kraakman, *supra* n. 2, at 406–07.

62. *Id.* at 407.

63. *Id.* at 408.



entrepreneur's insolvency than the business creditors had bargained for."<sup>64</sup> Additionally, the individual should only pursue an avenue of asset partitioning if the arrangement is both efficient and ultimately beneficial to all parties.<sup>65</sup>

The potential hazards that exist with the single owner enterprise are compounded at an exponential rate for each additional owner.<sup>66</sup> All owners would have to obtain subordination agreements for past, present, and future personal creditors, and, again, each individual would have substantial incentive to shirk this responsibility.<sup>67</sup> The costs of obtaining affirmative asset partitioning through contract would be incredibly prohibitive.<sup>68</sup>

Next, Hansmann and Kraakman turn to liquidation protection, which would be difficult to obtain under basic property law, in which "[e]ach co-tenant of property held as tenancy in common has a right to force partition of the property."<sup>69</sup> Theoretically, creditors of the bankrupt tenant could force partition if they stepped into the tenant's shoes.<sup>70</sup>

The authors are less confident about the possibility of transferring ownership of the assets of the business to an independent manager, who would be bound by contract to act as an "agent for the owners, manage the assets for the exclusive benefit of the owners and to reconvey the assets to the owners under appropriate circumstances."<sup>71</sup> This would protect the business creditors from the owners' personal creditors.<sup>72</sup> However, this would merely shift the problems found under the single ownership enterprise to the manager, who would have the same incentive not to acquire subordination agreements.<sup>73</sup>

Finally, Hansmann and Kraakman attempt to fashion a basis for the regulation of business organizations by supplementing contract law with the law of security interests.<sup>74</sup> Essentially, they find that the law of security interests does not create a strong form of liquidation protection because "in their contemporary form, [security interests do not] offer a means of preventing one or another class of creditors from forcing liquidation of the assets in satisfaction of their claim."<sup>75</sup>

Turning back to defensive asset partitioning, Hansmann and Kraakman examine the benefits of traditional limited liability to business organizations.<sup>76</sup> First, they argue that limits on liability create monitoring economies like those generated by affirmative asset partitioning by allowing personal creditors to focus on one set of assets.<sup>77</sup>

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64. *Id.*

65. *Id.* at 410.

66. Hansmann & Kraakman, *supra* n. 2, at 410.

67. *Id.* at 411.

68. *Id.* at 410.

69. *Id.* at 411.

70. *Id.* at 411–12.

71. Hansmann & Kraakman, *supra* n. 2, at 414.

72. *Id.*

73. *Id.* at 415.

74. *Id.* at 417.

75. *Id.*

76. Hansmann & Kraakman, *supra* n. 2, at 423.

77. *Id.* at 424.

Second, defensive asset partitioning reduces the cost of firm governance by ensuring that all owners experience the same proportional gains and losses from the firm's policies.<sup>78</sup> Third, asset partitioning reduces governance costs by shifting the burden of monitoring the firm's managers from the owners to the creditors.<sup>79</sup> Fourth, limited liability lowers the cost of "securing and collecting personal judgments against the personal assets of the firm's owners."<sup>80</sup> Fifth, limited liability facilitates the transfer of ownership by allowing owners to separate corporate liabilities from their own.<sup>81</sup> Finally, defensive asset partitioning provides for risk sharing by splitting the liabilities of the corporation from the owners and by splitting the liabilities of the owners from each other.<sup>82</sup>

Hansmann and Kraakman argue that organizational law is not as essential to creating defensive asset partitioning as it is to affirmative asset partitioning.<sup>83</sup> Theoretically, without organizational law, defensive asset partitioning would take the form of unlimited joint and several liability, as it does in the general partnership model.<sup>84</sup> To achieve defensive asset partitioning, the partnership interest would have to obtain agreements from creditors that would prevent an attack on the owners' personal assets.<sup>85</sup> Acquiring such agreements may increase transaction costs substantially, but there is historical precedent for such a model.<sup>86</sup> As business law evolved, courts came to recognize and honor limited liability clauses that joint-stock companies inserted into creditor agreements.<sup>87</sup> Organizational law would lower transaction costs, but firms can feasibly obtain defensive asset partitioning through the law of contracts.<sup>88</sup>

Having established that affirmative asset partitioning is an essential function of organizational law, Hansmann and Kraakman finally turn to whether organizational law serves other functions.<sup>89</sup> They find that organizational law facilitates contracting with creditors through other provisions, such as the assignment of property claims among creditors.<sup>90</sup> Organizational law also "regulates relations among the owners of a firm and relations between the firm's owners and its managers."<sup>91</sup> This easily can be handled through boilerplate contracts, particularly fiduciary duties.<sup>92</sup> "Absent such explicit contracting, the law of agency" can also handle these issues.<sup>93</sup> Additionally, transferability of contractual rights and duties is possible if all contracting parties expressly agree, which would be burdensome.<sup>94</sup> Organizational law provides a way

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78. *Id.*

79. *Id.* at 425.

80. *Id.* at 425–26.

81. Hansmann & Kraakman, *supra* n. 2, at 426.

82. *Id.* at 426–27.

83. *Id.* at 429.

84. *Id.*

85. *Id.* at 429–30.

86. Hansmann & Kraakman, *supra* n. 2, at 430.

87. *Id.*

88. *Id.*

89. *Id.* at 432.

90. *Id.* at 433.

91. Hansmann & Kraakman, *supra* n. 2, at 433.

92. *Id.* at 434.

93. *Id.*

94. *Id.*

around that.<sup>95</sup> Finally, withdrawal rights can be established without resorting to organizational law; however, standard property law prohibits unlimited agreements not to partition.<sup>96</sup> This actually raises a potential third form of asset partitioning: protecting the owners from liquidation by other owners. But Hansmann and Kraakman only gloss over this potential benefit of organizational law.<sup>97</sup>

The authors conclude that traditional analysis, even traditional economic analysis of corporate law, misperceive the foundations of organizational law. For them, it is not contractual webs of relationships in self-defining systems that accurately reflect the realities of organizational behavior. Rather, the ability to define the property rights over which participants in a firm can contract is the defining function of organizational law.<sup>98</sup> Organizational law is essentially property law—not contract law. Without organizational law, large organizations could not be created effectively.<sup>99</sup> But what, exactly, does that mean for large organizations?

Reaction to Hansmann and Kraakman's asset partitioning article, at least among those who have considered their arguments, has been positive. Scholars have not only accepted the authors' asset partitioning article in light of organizational law but have attempted to apply asset partitioning to an array of disciplines from bankruptcy law<sup>100</sup> to agency law.<sup>101</sup> Lynn Stout agrees that the primary defining characteristic of a corporation is asset partitioning but argues that the end reason for this is not to protect creditors' rights, as Hansmann and Kraakman claim.<sup>102</sup> Instead, she argues that asset partitioning encourages "capital lock-in," where investors irretrievably invest their capital within a corporation.<sup>103</sup> Stout believes that the "new school" view of the corporation as an asset partition will dominate scholarship but that scholars should use the theory to explore other questions, such as board governance.<sup>104</sup> Similarly, Margaret Blair notes the importance of asset partitioning between the organization and shareholder, which prevents liquidation of the corporation.<sup>105</sup>

Still, some scholars have suggested weaknesses in the theory. Although affirmative asset partitioning or entity shielding are necessarily prior to defensive asset partitioning within the theoretical model, empirical evidence demonstrates that historical analysis of the evolution of corporate forms does not allow for proper predictions of future organizational evolution.<sup>106</sup> Per Samuelson analyzes the historical and modern development of Swedish business organizations and finds that historical analysis alone is

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95. *Id.*

96. Hansmann & Kraakman, *supra* n. 2, at 434–35.

97. *Id.* at 435.

98. *Id.* at 440.

99. *Id.*

100. Douglas G. Baird, *The New Face of Chapter 11*, 12 Am. Bankr. Inst. L. Rev. 69 (2004).

101. Robert B. Thompson, *Agency Law and Asset Partitioning*, 71 U. Cin. L. Rev. 1321 (2003).

102. Lynn A. Stout, *On the Nature of Corporations*, 2005 U. Ill. L. Rev. 253, 254 (2005).

103. *Id.* at 255 (citing Margaret M. Blair, *Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century*, 51 UCLA L. Rev. 387, 388–89 (2003)).

104. *Id.* at 266–67.

105. Blair, *supra* n. 103.

106. Per Samuelson, *On the Evolution of Corporate Forms*, 2005 U. Ill. L. Rev. 15, 29 (2005).

insufficient to predict modern business trends.<sup>107</sup> Samuelson argues that “a careful investigation as to what jural relations (rights, duties, liabilities, and so on)”<sup>108</sup> related to asset partitioning must be conducted to strengthen Hansmann and Kraakman’s theory.

My sense is that Stout is onto something—but not necessarily the “something” on which she would have us focus. Asset partitioning does more than provide a default rule for defining property rights in enterprise property. The property rights defined have a particular vector. That vector is clearly targeted in the direction of protecting the integrity of the assets aggregated in the entity. This is so whether one views the protection as flowing to the individuals who own the entity or to the entity itself. Either way, the protection is tied to the aggregation of capital within the entity.

In this sense, at least, what Hansmann and Kraakman identify is a significant component of autonomy in the enterprise itself. Asset partitioning theory acts to do two things that further entity autonomy. It suggests, first, that a self-contained (or containing) vessel must exist into which assets can be segregated and, second, that assets and other things of value can be segregated within and placed beyond the direct reach of people with an interest in the entity. Older notions of entities as pass-through emphasized the direct relationship between owner and the aggregation of assets owned. But strengthening asset partitioning also strengthened the possibility of entity autonomy at the expense of direct control by the shareholder. More importantly, it provided a single institutional shield for assets aggregated by a collective. When combined with the idea of the independence of juridical personhood, it provided a means to disperse assets in a way that protected them from creditor and owner alike. An entity that can disperse assets and other things of value among other entities it owns or controls can significantly enhance its operation as a unit independent of its owners or those with interests in its assets, such as creditors and other stakeholders.<sup>109</sup>

For all of its potential, one of the most striking limitations about the analysis of Hansmann and Kraakman is its fidelity to the principle of territoriality. Underlying the analysis is an unquestioned assumption that there must exist a one-for-one correspondence between entity, assets, creditors, and the regulating community. Hansmann and Kraakman have little to say about the objective of law or even the appropriate classification of organizational law in which any one of the critical factors of the analysis straddles political borders. Alternatively, Hansmann and Kraakman may make the assumption that a one-for-one correspondence exists—irrespective of the location of assets, entity, and creditors—because the regulation of asset partition would, at least at some level of generality, be uniform across regulating states. But that cannot be true.<sup>110</sup> Where assets are dispersed among a variety of jurisdictions, which have different approaches; where creditors are dispersed; or where entities are divided or their

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107. *Id.* at 24–28.

108. *Id.* at 29 (emphasis omitted).

109. See Sandra K. Miller, *Piercing the Corporate Veil among Affiliated Companies in the European Community and in the U.S.: A Comparative Analysis of U.S., German, and U.K. Veil-Piercing Approaches*, 36 Am. Bus. L.J. 73, 84–95 (1998).

110. Thus, for example, it would be difficult to suggest that the asset partition rules of China, Saudi Arabia, or Cuba conform to the model on which Hansmann and Kraakman’s analysis rests. See e.g. Hansmann & Kraakman, *supra* n. 2, at 393–98.

operations dispersed across political jurisdictions, it is not clear what asset partitioning tells us for purposes of organization law. In this respect, at least, asset partitioning theory, standing alone, does not help much.

### III. THE AUTONOMOUS CORPORATION AND ITS SHAREHOLDERS BEYOND THE STATE

The most interesting recent work on enterprise personality has its sources well away from the United States. Iwai, in particular, has explored the nature of the relationships possible between an entity and its owners. His work is particularly important here for two insights. The first is the idea that, even within free market systems, the character of enterprises can vary according to the enterprise culture of the state in which such entities (and ownership in such entities) are regulated. The second is the idea that among the variants possible is one in which entities can exist free of a direct connection to their owners—that is, that an entity can own itself.

Iwai argues that a corporation is neither truly a person nor a thing but a unique amalgamation of the two because it has the propensity to both own and be owned.<sup>111</sup> The corporation owns all of the assets of the corporation, which only a legal person can do; however, unlike natural people, who cannot be owned, the corporation is owned by shareholders.<sup>112</sup> The essence of a corporation, according to Iwai, is its function as a coordinator of “complex contractual relations between inside shareholders and outside parties by directly entering into contracts with the latter on behalf of the former.”<sup>113</sup> Iwai emphasizes that he views the corporation, not as a nexus of contracts, but as a thing owned by shareholders that has the capacity to fully participate in contractual relationships as the holder of corporate assets.<sup>114</sup> Asset partitioning, both positive and negative, necessarily emerges from the corporation’s person/thing dual nature because if the corporation is the sole holder of corporate assets, the converse must also be true: the shareholder’s assets are also “separate and distinct” from those of the corporation.<sup>115</sup>

Iwai focuses on the corporation’s person/thing duality—that a corporation acting as a person can own other corporations and, in turn, can be property owned by other corporations.<sup>116</sup> Since 1889, when New Jersey legalized holding companies, corporations both inside and outside of the United States have bought and sold the shares of other corporations for merger and investment purposes.<sup>117</sup> For Iwai’s purposes, the traditional holding company falls short, though, because dominant shareholders who are flesh-and-blood human beings control any holding company.<sup>118</sup> The corporation, even as entity, remains primarily a thing in the hands of its ultimate shareholders.

In theory, a corporation could buy back its own shares held by third parties and then become its own controlling shareholder and, thus, almost a full-person that is

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111. Iwai, *supra* n. 11, at 589–90.

112. *Id.* at 589.

113. *Id.* at 590.

114. *Id.* at 591.

115. *Id.*

116. Iwai, *supra* n. 11, at 597.

117. *Id.* at 598.

118. *Id.* (arguing “[n]onetheless, the holding company still falls short of shedding its thingness entirely, because it has its own dominant shareholders watching over it”).

capable of self-determination.<sup>119</sup> Most countries prohibit these sort of corporate buybacks, so “in the real economy . . . it appears impossible for a corporation to become its own owner.”<sup>120</sup> A more realistic scenario emerges initially when one posits that one corporation, Corporation A, owns all of the shares of another corporation, Corporation B, who in turn owns all of the shares of Corporation A.<sup>121</sup> This “cross-shareholding” allows each corporation to essentially own itself through the other corporation and shed itself of shareholder control.<sup>122</sup> While many countries still have laws against cross-ownership as outlined above, Iwai hypothesizes that it would be entirely possible for twelve corporations to individually acquire five percent of each others company’s shares but none of its own.<sup>123</sup> The majority of each corporation’s shareholders would be the other corporation’s, effectively ending the domination of the human shareholder over any of the corporations.<sup>124</sup> While flesh-and-blood human beings still technically control the corporation, human ownership becomes doubly removed from directorial governance. Even assuming that corporate directors remain bound by a fiduciary duty directly to shareholders (as an aggregate body) and not to the corporation (as an entity), the will of the shareholders is now effectively that reflected by the aggregate of the cross-holding corporations, each of which in turn is directed by its own board. The circle is complete.<sup>125</sup> The corporation does not become “ownerless” in this scenario but is instead self-owning, self-determinate, and liberated from direct individual human shareholder control.<sup>126</sup>

My sense is that Iwai is onto something. But I think the idea has greater utility than explaining differences in corporate behavior on a comparative basis. Its forward-looking possibilities are worth exploring. The self-owning corporation frees itself from any necessity of a correspondence between the needs of the entity (to survive and grow) and the needs of its owners (to increase their wealth). A self-owning entity with an objective of maximizing the value of the entity can make decisions based on the valuation of a selected mix of factors that can be very different from what the entity might have used, had its ultimate objective been limited to maximizing the short term value of the shareholder’s interests in the entity (or of the aggregate). This idea is not revolutionary by any stretch. The Delaware courts have embraced a variant of this insight by respecting the power of boards of directors to resist purchase offers.<sup>127</sup>

However, the possibility of self-ownership suggests more than the contours of relationships between owners and entity. It suggests that the self-owning corporation can

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119. *Id.*

120. *Id.*

121. Iwai, *supra* n. 11, at 598–99.

122. *Id.* at 599.

123. *Id.*

124. *Id.* Iwai argues that “[t]hese twelve corporations would indeed become their own owners at least as a group. And if fifty-two corporations can get together, they only have to hold 1 percent of each other’s shares to secure the majority block for each. It is therefore practically impossible to prevent corporations from becoming their own owners, if they so wish.” *Id.*

125. Iwai, *supra* n. 11, at 613.

126. *Id.* at 600.

127. See e.g. *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985); *Cheff v. Mathes*, 199 A.2d 548 (Del. 1964).

effectively avoid regulation by its shareholders. If shareholders do not control the entity directly—if the entity controls itself—then it is the entity’s managers who become the instruments of this control. The parameters of this control are then subject to managerial self-restraint. That self-restraint is cultural.<sup>128</sup> There has been much recent scholarship on the importance of enterprise culture to the operation of enterprises “on the ground.”<sup>129</sup> But restraint is also political. Autonomous from its shareholders, the self-governing enterprise is still subject to the political will of the state under the rules of which it has been organized. Even a realistic capitalism “presupposes the capacity of the state or ‘system’ to exercise power with authority in conscious, willed aims and directions.”<sup>130</sup>

Iwai’s realistic enterprise suggests the possibility of an entity autonomous from its shareholders, just like Hansmann and Kraakman’s enterprise suggested the possibility of entity autonomy with respect to enterprise creditors. But, like the possibility of enterprise autonomy from creditor-stakeholders suggested by Hansmann and Kraakman, the possibility of enterprise autonomy from shareholder-stakeholders suggested by Iwai is limited by a territorial principle. The suggested self-ownership and autonomy from shareholders are grounded on the necessity for a correspondence between regulatory authority, an economic-cultural source, and the self-owning enterprise.

Our new indeterminacy thesis has opened up a new way of linking the formal system of law with the actual world of society. Law is . . . able to provide a “menu” of corporate structures from which a society can choose. Indeed, each society can choose any position along a long spectrum that runs from a purely “nominalistic” to a purely “realistic” structure, on the basis of or at least under the influence of economic efficiency, political interests, ideological forces, cultural traditions, historical evolution and other extra-legal factors.<sup>131</sup>

Entity autonomy, then, is limited by the culture that permits its existence within the territory of the legal regime that provides the framework within which it can operate. Thus, Iwai suggests that the “dominant corporate form varies widely from country to country.”<sup>132</sup> In a world in which there is correspondence between the regulator and its object of regulation, this model works well. But what happens when the critical factor—correspondence—is eliminated? It is to a world in which that variable is no longer controlled, but in which both entity autonomy from shareholders and entity autonomy for creditors is preserved, that we turn to next.

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128. Iwai, *supra* n. 11, at 607 (“Notwithstanding large variations within each type of capitalism, we still find it a useful working hypothesis to assume that American managers are generally expected to maximize the returns to shareholders and that Japanese managers are generally expected to emphasize the survival and growth of the corporation as an organizational entity.”); see Tadao Kagono et al., *Strategic vs. Evolutionary Management: A U.S.-Japan Comparison of Strategy and Organization* (Nichi-Bei kigyō no keiei hikaku trans., Elsevier Sci. Publ. Co. 1985).

129. E.g. Mark J. Roe, *Strong Managers, Weak Owners: The Political Roots of American Corporate Finance* (Princeton U. Press 1994); see also Michael E. Porter, Hirotaka Takeuchi & Mariko Sakakibara, *Can Japan Compete?* (Basic Bks. 2000).

130. John Owen Haley, *Authority without Power: Law and the Japanese Paradox* 139 (Oxford U. Press 1991).

131. Iwai, *supra* n. 11, at 604.

132. *Id.* (Iwai proceeds to explore two capitalisms: the realism of Japan and the nominalism of the United States.).

#### IV. GLOBALIZATION AND PERVERSITY: THE TERRITORIAL AND REGULATORY HIERARCHY PRINCIPLES IN A TRANSNATIONAL CONTEXT

The correspondence between enterprise regulation and the borders of state power has proven to be both troublesome and persistent. The territorial principle is easy enough to state:

For several hundred years, the European and later the world order, has been characterised by the central role of the sovereign nation state. The world is divided into territorial units housing permanent populations each of which is subject to the exclusive and comprehensive rule of an apparatus consisting of various agencies—including those responsible for legislation, adjudication and administration—which is called a sovereign state.<sup>133</sup>

The territorial principle underlies the little questioned notion that it is the state that permits the creation of any entity, endows it with qualities, and permits it to assert legal rights in its courts. “The internal legal order of [a multinational enterprise] is, therefore, endorsed by each relevant state and becomes part of the domestic law of each state, or is integrated into the state’s legal order because those states consent to it.”<sup>134</sup> The territorial principle, based on notions of sovereignty, also implies the idea of regulatory hierarchy—state regulation is the supreme form of the constitution of entities and of the rules governing the relationship between entity and those with an interest in it. To the extent that such interests are represented by private contractual arrangements, the state is involved as well—for it is the state that countenances these arrangements and permits their enforcements through its administrative and judicial apparatus. “The ‘traditional rule’ attributes rights (and by implication, liabilities) with respect to a [transnational corporation (“TNC”)] to the state under the laws of which the TNC is incorporated and in the territory of which it has its registered office.”<sup>135</sup>

But territories have limits. And the territorial principle—for all of the supremacy it lends to state and political power or the power of law—also has well-defined limits. Those limits correspond to the borders of the state itself. The territorial principle thus has a corollary principle of non-interference—the power to exclude external actors (principally other states) from exercising domestic authority.<sup>136</sup> Only one state exists for every territory.<sup>137</sup> “The *grundnorm* of such a political arrangement (sovereign statehood) is the basic prohibition against foreign intervention which simultaneously imposes a duty of forbearance and confers a right of independence.”<sup>138</sup> This non-interference corollary significantly impedes extra-territorial application of

133. Jürgen Basedow & Toshiyuki Kono, *Legal Aspects of Globalization: Conflict of Laws, Internet, Capital Markets and Insolvency in a Global Economy* 4 (Aspen Pubs. 2000).

134. Tania Voon, *Multinational Enterprises and State Sovereignty under International Law*, 21 *Adelaide L. Rev.* 219, 238 (1999) (footnote omitted).

135. Fleur Johns, *The Invisibility of the Transnational Corporation: An Analysis of International Law and Legal Theory*, 19 *Melbourne Univ. L. Rev.* 893, 895 (1994) (citing *Barcelona Traction, Light & Power Co., Ltd. (Belgium v. Spain)*, 1970 I.C.J. 3, ¶ 70) (footnote omitted).

136. See *U.S. v. Nicaragua*, 1986 I.C.J. 14, ¶ 202.

137. Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* 20 (Princeton U. Press 1999).

138. *Id.* (quoting Robert H. Jackson, *Quasi-States: Sovereignty, International Relations, and the Third World* 6 (Cambridge U. Press 1990)) (internal quotation marks omitted, emphasis in original).



national law, though it does not prevent such application entirely, especially by politically powerful states.

The classical model of enterprise tended to posit a correspondence between enterprise and its regulatory regime. In that context, both the territorial principle and the principle of regulatory hierarchy work well. Every entity is subject to the sole regulation of a single state. Each entity is itself subject to the same sort of regulation, and that regulation is superior to any sort of arrangements that the entity stakeholders can make. A consciousness that this reality had changed began to emerge in the last century:

[I]f one looks to the modern world economy, one concludes that enterprises have increasingly chosen to organize and conduct their business operations in the form of a cluster of various separate corporations, rather than as a single corporate entity. Instead of the initial atomistic corporate world living under a perfect competition and free market model, the present century assisted the rise of an economic order largely dominated by multinational and multicorporate groups. Therefore, the major enterprise has typically evolved as a complex, large-scale business network, where the different parts of a unitary business are allocated to a group of affiliated corporations (subsidiary corporations), global co-ordination is obtained through the submission of such legally independent parts to a common economic strategy, and management of the whole is exercised by headquarters (parent corporation).<sup>139</sup>

If one adds to the mix the possibility of non-corporate economic enterprises and networks of economic affiliations in non-corporate forms,<sup>140</sup> one can begin to imagine a world in which economic and political activity do not march in lock step over the same terrain.<sup>141</sup> In such a world the factors that make the territorial and regulatory hierarchy principles so valuable in the governance of entities within a particular territory produce a perverse effect.

The context in which the consequences of a global network of national systems in which entity autonomy had been solidified, and entity self-ownership was possible, was the emergence of globalization after World War II. Globalization comprised a system of free movement of capital, and to a lesser extent, labor and technology. Consciousness of the perversities of the system emerged with an understanding of the manner in which the state-based system of entity regulation limited the regulation of these entities. The greater the possibility of dispersal of operations among different regulatory regimes, the greater the advantage to the entity at the expense of the regulating territorial unit. "Indeed, the ability of a [multinational enterprise] to take advantage of differences in regulatory environments between states is seen as one of its internalization advantages."<sup>142</sup>

The nature of the perversities is well-known.<sup>143</sup> They range from the benign to the disturbing. Enterprises can exploit the territorial principle, the principles of limited

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139. José Engrácia Atunes, *The Liability of Polycorporate Enterprises*, 13 Conn. J. Intl. L. 197, 203 (1999) (footnote omitted).

140. Muchlinski, *supra* n. 18, at 57–89.

141. Jean-Philippe Robé, *Multinational Enterprises: The Constitution of a Pluralistic Legal Order*, in *Global Law without a State* 45, 46 (Gunther Teubner ed., Dartmouth Publ. 1997).

142. Muchlinski, *supra* n. 18, at 45.

143. For a description, see Johns, *supra* n. 135, at 904–11.

liability, and that of independent juridical personality to minimize risk to assets partitioned to the entity. This risk minimization is accomplished by distributing assets among widely dispersed subsidiaries incorporated in different jurisdictions and by engaging in enterprise activities indirectly through joint ventures, distributorships, franchises, local agents, or other indirect forms of operation. Multinational enterprises have been able to exploit their economic power to negotiate with states for the enactment of regulations favorable to the enterprise and to avoid liability for local actions, local taxes, and other impositions charged by the state to others similarly situated. Multinational enterprises have also used their power to intervene directly or indirectly in the politics of political jurisdictions. The involvement of large enterprises in local civil wars, coups, and other changes of government, and the willingness of enterprises to engage in local corruption are well documented. Traditional methods for limiting the ability of multinational enterprises to avoid local consequences—piercing the corporate veil, imposition of enterprise liability, extraterritorial application of local law, invoking the legal process of the courts of the territory of the parent company of an integrated enterprise—have had little success in extending the power of states relative to these enterprises in a world in which enterprises may move capital and operations with some ease (at least to some places) and then protect those assets by invoking the territorial principle and the non-interference principle.<sup>144</sup>

The limitations of the territorial principle and its perverse consequences for the regulation of enterprises, the operation of which was widely dispersed across regulating states, became well-known by the end of the twentieth century. Even the United States, a state with an extraordinarily long regulatory arm, discovered the limitations of its regulatory reach at the conclusion of World War II, with respect to enterprises traditionally considered “American.”

The activities of General Motors, Ford and Chrysler prior to and during World War II . . . are instructive. At that time, these three firms dominated motor vehicle production in both the United States and Germany. Due to its mass production capabilities, automobile manufacturing is one of the most crucial industries with respect to national defense. As a result, these firms retained the economic and political power to affect the shape of governmental relations both within and between these nations in a manner which maximized corporate global profits. In short, they were private governments unaccountable to the citizens of any country yet possessing tremendous influence over the course of war and peace in the world.

During the 1920's and 1930's, the Big Three automakers undertook an extensive program of multinational expansion. . . . By the mid-1930's, these three American companies owned automotive subsidiaries throughout Europe and the Far East; many of their largest facilities were located in the politically sensitive nations of Germany, Poland, Rumania, Austria, Hungary, Latvia, and Japan. . . . Due to their concentrated economic power over motor vehicle production in both Allied and Axis territories, the Big Three inevitably became major factors in the preparations and progress of the war.

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144. See Sarah Joseph, *Corporations and Transnational Human Rights Litigation* (Hart Publg. 2004).

The outbreak of war in September 1939 resulted inevitably in the full conversion by GM and Ford of their Axis plants to the production of military aircraft and trucks.

On the ground, GM and Ford subsidiaries built nearly 90 percent of the armored "mule" 3-ton half-trucks and more than 70 percent of the Reich's medium and heavy-duty trucks. These vehicles, according to American intelligence reports, served as "the backbone of the German Army transportation system."

After the cessation of hostilities, GM and Ford demanded reparations from the U.S. Government for wartime damages sustained by their Axis facilities as a result of Allied bombing. . . . Ford received a little less than \$1 million, primarily as a result of damages sustained by its military truck complex at Cologne.<sup>145</sup>

By the 1970s, multinational enterprises "began to be described as a challenge to the nation state, a creature with no loyalties except to itself, an entity that caused economic, social and political disruption in both the host and home countries, and aimed at global dominance. The [multinational enterprise] had to be tamed."<sup>146</sup>

But taming the multinational enterprise was easier said than done in the context of an international system unwilling to yield the primacy of the territorial principle. The regulatory limitations of the territorial principle are evidenced by examining the way the principle constrains state attempts to regulate multinational enterprises that are not subject to regulation in their entirety by any single jurisdiction. The Organisation for Economic Cooperation and Development ("OECD") *Guidelines for Multinational Enterprises*<sup>147</sup> represent the efforts by a cluster of developed states to coordinate their regulation of economic enterprises by suggesting a code of conduct for multinational enterprises.<sup>148</sup> Consider, in a different light, the way in which the OECD works. Its foundations are grounded in the limitations and state-centered prerogatives of the territorial principle. In essence, the OECD is a loose organization of states pledged to cooperate with each other.<sup>149</sup> Each, however, guards its power to regulate within

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145. Sen. Subcomm. on Antitrust & Monopoly of the Comm. on the Jud., *American Ground Transport: A Proposal for Restructuring the Automobile, Truck, Bus, and Rail Industries*, 93d Cong. 16–17, 22 (Feb. 26, 1974) (footnotes omitted) (authored by Bradford C. Snell). The proposal rejected the idea that there was equivalence between the war conduct of the automakers in World War II and the common American corporate practice of donating to the two large political parties. "Had the Nazis won, General Motors and Ford would have appeared impeccably Nazi; as Hitler lost, these companies were able to reemerge impeccably American. In either case, the viability of these corporations and the interests of their respective stockholders would have been preserved." *Id.* at 22–23.

146. Muchlinski, *supra* n. 18, at 7.

147. OECD, *Guidelines*, *supra* n. 18. For a discussion of the OECD *Guidelines*, see Muchlinski, *supra* n. 18, at 578–92.

148. OECD notes: "The *Guidelines* are recommendations jointly addressed by governments to multi-national enterprises. They provide principles and standards of good practice consistent with applicable laws." OECD, *Guidelines*, *supra* n. 18, at 17.

149. The Chair of the Ministerial stated,

The *Guidelines* are recommendations on responsible business conduct addressed by governments to multinational enterprises operating in or from the 33 adhering countries. While many businesses

its territory. Legislative power is not devolved to this organization. Thus, it is also limited by the hierarchy principle of regulation. The limits of the provision of governance mechanisms beyond the state, then, in the words of the OECD website, are reduced to reliance on “dialogue, consensus, peer review and pressure.”<sup>150</sup>

By both preserving control over the state’s respective limited territorial jurisdictions and seeking to coordinate regulation within a group of like-minded jurisdictions, the OECD evidences the limits of its authority to regulate those organizations outside of its jurisdiction.<sup>151</sup> It must treat all such objects of regulations as regulatory equals in effect.<sup>152</sup> OECD guidance is thus voluntary, not necessarily because voluntary compliance is a good in itself, but because compulsion, the usual methodology of the state, is not available. The effectiveness of compliance is based on a willingness to provide guidelines that the “guided” are willing to bear. Consultation and cooperation with the guided, therefore, forms a basis of the regulatory activity of the OECD.<sup>153</sup> Peer pressure and review is also constrained by both the territorial principle and the regulatory hierarchy principle and limited to the state party members of the OECD in the context of maintaining their mutual obligations under the OECD Convention.<sup>154</sup>

Resistance to any substantial efforts by international institutions to create a legal framework for the regulation of multinational enterprises has been effective. These efforts, led by nation-states, have been fueled by fear that internationalization will erode the primacy of states as regulators. The latest failure involved the abandonment of a

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have developed their own codes of conduct in recent years, the OECD *Guidelines* are the only multilaterally endorsed and comprehensive code that governments are committed to promoting.

*Id.* at 5.

150. OECD, *About OECD*, [http://www.oecd.org/about/0,2337,en\\_2649\\_201185\\_1\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/about/0,2337,en_2649_201185_1_1_1_1_1,00.html) (accessed July 21, 2006).

151. Together, the U.N. Global Compact Office and the OECD Secretariat stated:

Although the OECD welcomes expressions of support for the *Guidelines*, its implementation process does not depend on them—the normative framework upon which the *Guidelines* is based is deemed to be so fundamental that its relevance to companies is taken for granted. Responsibility for promoting the recommendations in the *Guidelines* lies primarily with the adhering governments as does the administration of the *Guidelines*’ unique follow up mechanism.

U.N. Global Compact & OECD, *The UN Global Compact and the OECD Guidelines for Multinational Enterprises: Complementarities and Distinctive Contributions* 6 (Apr. 26, 2005) (available at [http://www.oecd.org/LongAbstract/0,2546,en\\_2649\\_37461\\_34873732\\_1\\_1\\_1\\_37461,00.html](http://www.oecd.org/LongAbstract/0,2546,en_2649_37461_34873732_1_1_1_37461,00.html) (accessed July 21, 2006)).

152. Thus, for example, the mechanisms provided for implementing the *Guidelines* suggest that the state parties are effectively no more than facilitators of the *Guidelines*. Both the system of National Contact Points and the oversight of the Committee on International Investment and Multinational Enterprises suggest a focus on persuasion, publicity, and communication, rather than compulsion. See OECD, *Guidelines*, *supra* n. 18, at 35–37.

153. The OECD website notes that

[s]ince its creation, the OECD has co-operated with civil society, principally through the Business and Industry Advisory Committee to the OECD (BIAC) and the Trade Union Advisory Committee (TUAC). The OECD also has long-standing relations with parliamentarians through the Parliamentary Assembly of the Council of Europe and the NATO Parliamentary Assembly.

OECD, *Civil Society and Parliamentarians*, [http://www.oecd.org/departement/0,2688,en\\_2649\\_34495\\_1\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/departement/0,2688,en_2649_34495_1_1_1_1_1,00.html) (accessed July, 21, 2006).

154. See Fabrizio Pagani, *Peer Review: A Tool for Co-Operation and Change: An Analysis of an OECD Working Method*, <http://www.oecd.org/dataoecd/33/16/1955285.pdf> (accessed July 21, 2006).

United Nations project to create a binding body of *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* ("Norms").<sup>155</sup> The history of the failure of the *Norms* evidences both the perverse power of the territorial principle and the limitations of international political institutions to overcome that perversity and reassert a politically centered regulatory framework. The *Norms* reflected the belief of many developing states, academics, and non-governmental human rights organizations, as embraced within the human rights institutions of the United Nations:

[T]he global power of TNCs dwarf that of many developing nations. TNCs' economic power produces social and political power as well, power that is enormous and global. TNCs can affect the level of enjoyment of the economic, social, and political rights of people across states, but states cannot effectively regulate them. Some regulation at the international level is necessary to control the possibility of abuse by TNCs of their dominant position and to ensure that TNCs contribute to the development of less developed states and to the protection of individuals' social, political, and economic rights.<sup>156</sup>

Originally it was presented as a legally binding instrument of international governance imposing direct obligations on TNCs. It became clearer that the *Norms* would effectively be abandoned in their current form by the spring of 2005. It appeared that the High Commissioner would recommend that the Commission "maintain the draft *Norms* among existing initiatives and standards on business and human rights, with a view to their further consideration."<sup>157</sup> This result followed intense pressure from developed

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155. See U.N. Commn. on Hum. Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, <http://www.unhchr.ch/huridocda/huridoca.nsf/0/64155e7e8141b38cc1256d63002c55e8?OpenDocument> (accessed July 21, 2006). All references to the *Norms* are to the revised *Norms*. For the official commentary on the *Norms*, see U.N. Econ. & Soc. Council, Commn. on Hum. Rights Sub-Commn. on the Promotion & Protec. of Hum. Rights, *Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, [http://www.unhchr.ch/Huridocda/Huridoca.nsf/\(Symbol\)/E.CN.4.Sub.2.2003.38.Rev.2.En?Opendocument](http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2003.38.Rev.2.En?Opendocument) (accessed July 21, 2006). For a report on the finalization of the statement of *Norms*, see U.N. Econ. & Soc. Council, Commn. on Hum. Rights Sub-Commn. on the Promotion & Protec. of Hum. Rights, *Report of the Sessional Working Group on the Working Methods and Activities of Transnational Corporations on its Fifth Session*, <http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/906e3013f1cb27eac1256d82004d7fe2?Opendocument> (accessed July 21, 2006). For a discussion of the *Norms*, see Backer, *supra* n. 19.

156. Backer, *supra* n. 19, at 319.

157. U.N. Econ. & Soc. Council, Commn. on Hum. Rights, Sub-Commn. on the Promotion & Protec. of Hum. Rights, *Report of the United Nations High Commissioner on Human Rights on the Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights*, <http://www.ohchr.org/english/bodies/chr/docs/61chr/E.CN.4.2005.91.doc> (accessed July 23, 2006). The *Report of the High Commissioner* also suggested:

Much of the consultation process focused on the draft "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights." In spite of opinions on the draft still being divided, there is merit in identifying more closely the "useful elements" of the draft Norms noted by the Commission in its decision 2004/116. In particular, the "road-testing" of the draft Norms by the Business Leaders' Initiative on Human Rights could provide greater insight into the practical nature of the human rights responsibilities of business.

*Id.* at 18. Indeed, by the end of 2005, the Business Leaders Initiative on Human Rights, in conjunction with the U.N. Global Compact and the Office of the High Commissioner for Human Rights, had produced a consultation draft that in many respects mirrored the focus of the *Norms*. Bus. Leaders Initiative on Hum. Rights, *A Guide for Integrating Human Rights into Business Management*, <http://www.blihr.org/Pdfs/GIHRBM.pdf> (accessed July 23, 2006). Unlike the *Norms*, however, this effort was business-focused and voluntary, offering "practical guidance to companies that want to take a proactive approach to human rights within their business operations." *Id.* at 3.

states, especially the United States, to avoid the construction of any international system of regulation of economic enterprises.<sup>158</sup>

Thus, the territorial principle creates a framework within which power to regulate the enterprise is dispersed—from the state to a collection of collectives (states and enterprises and cooperative bodies) and among states. It does this by producing and sustaining regimes of voluntary multi-state systems of behavior control. In this environment, an enterprise with the ability to disperse assets and operations can substantially choose the aggregate of its regulatory environment—it can effectively regulate itself.

Self-regulation follows from the application of the territorial principle, coupled with the possibilities of enterprise autonomy reinforced by asset partitioning regimes, self-ownership, and juridical personhood. An autonomous legal subject, responsible for its own obligations and able to direct itself can, by distributing its operations in accordance with the benefits of particular territorially limited legal regimes, effectively choose the mix of regulation to which it will submit itself. It follows that such an enterprise can regulate itself. A fully self-conscious autonomy is now complete.

#### V. CAN AN ENTERPRISE REGULATE ITSELF? CREATING THE SELF-REGULATING ENTITY

I have discussed how the territorial principle and the principle of regulatory hierarchy can open the possibility of enterprise self-regulation. Any enterprise that can disperse its assets among a large enough number of regulatory units will transform the relationship between regulator and enterprise. For the traditional relationship that is both singular and hierarchical, globalization permits the enterprise to treat regulation as another factor in the production of wealth. The enterprise, now in a position to shop for regulatory regimes, or even bargain for domestication within the territory of a regulatory territory, can take advantage of the limitations of the territorial principle to minimize the effects of regulation on enterprise activity. The principle of regulatory hierarchy can then be turned on its head. The ability to “commodify” regulation makes it at least theoretically possible to construct an economic entity which, through careful planning, can take advantage of asset partitioning, cross holdings, and global asset dispersion to avoid effective regulation by any one political community.

I have been sketching out a picture of regulatory autonomy at a fairly high level of abstraction. It may be useful to try to illustrate the concept in more concrete terms. I will suggest one example, though there are countless variations possible. It is important to note, however, that this is an area that would profit by much empirical research. For the moment, my purpose is to suggest a hypothesis and to provide the framework for analysis.

The self-regulating corporation I suggest here turns the usual analysis upside down. That usual analysis posits the distinctive regulatory problem posed by

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158. Memo. from U.S. Mission to Intl. Orgs. to Dzidek Kedzia, Chief of Research & Right to Dev. Branch, Off. of the U.N. High Commr. for Hum. Rights, *Note Verbale from the OHCHR of Aug. 3, 2004 (GVA 2537)* (Sept. 30, 2004), <http://www.ohchr.org/english/issues/globalization/business/docs/us.pdf> (accessed July 23, 2006) (“By attempting to establish duties and obligations for business entities, which are non-State actors, this exercise goes well beyond the present state of international law as well as international legal process.”).

multinational corporations is their ability to operate an integrated command and control system through two disaggregated institutional structures. The first of these structures is the collection of discrete corporate units—parent, subsidiary, sister, and cousin companies—that make up the Multi-National Corporation group. The second disaggregated structure housing the Multi-National Corporation is the global system of separate nation-states in which those corporations are registered and do business.<sup>159</sup>

In the usual case, this regulatory autonomy centers on the ability of a firm to avoid distasteful regulations relating to its operations. Consider, for example, *Clothing*, a company that makes its money by designing and selling to retail establishments several lines of children's clothing. *Clothing* is incorporated in Delaware, and its shares are traded on financial markets in the United States, Europe, and Asia. *Clothing's* headquarters are in Savannah, Georgia, where *Clothing* conducts all of its operations. Assume that United States regulations have now substantially increased the costs of making clothing in the United States. Assume further that these regulations may have extraterritorial effect because the regulations apply to all corporations incorporated in any United States jurisdiction, no matter where its operations are located.

*Clothing* has a variety of options to avoid this regulatory framework, for example, transferring its operations to directly owned subsidiaries abroad, contracting out the manufacture of clothing to partially owned or independent entities resident in other states, and entering into joint ventures for the direct manufacture or indirect manufacture of clothing elsewhere. The list is hardly exhaustive. *Clothing*—either directly or through its potential subsidiaries, joint venture partners, or (in)dependent contractors—can also engage in negotiations with appropriately selected host states for the appropriate form of regulatory environment. If the operations are sufficiently large or the needs of the host state are particularly easy to satisfy, there is some chance that local law might be modified to the benefit of *Clothing's* operations. To the extent that operations will be directly controlled, provision can be made for limiting the home corporation's exposure to liability under local law.<sup>160</sup> The cost savings from these efforts, if greater than the increased costs of the regulations in the home state, make these complexities worth the trouble.

Where a corporation can distribute its operations in a sufficiently complete way, it has turned the tables on the state. *Clothing* has essentially chosen, in the aggregate, the bundle of regulations to which its operations will be subject. By carefully choosing the place, form, and method of operation, it can effectively decide the manner in which it will be regulated. States may legislate to their hearts' content, but the enterprise will submit to those regulations only to the extent it is either unavoidable or profitable.

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159. Eric Engle, *Extraterritorial Corporate Criminal Liability: A Remedy for Human Rights Violations?* 20 St. John's J. Leg. Comment 287, 300 (2006).

160. This has become a complicated business as some jurisdictions have sought to apply a "corporate groups" or entity theory of liability, essentially holding a complex of related entities jointly liable for the wrongdoings of any of them under certain circumstances. These complications are suggested here but lie well outside the scope of this article. See e.g. Robert P. Austin, *Corporate Groups*, in *Corporate Personality in the 20th Century* 71–89 (Ross Grantham & Charles Rickett eds., Hart Publg. 1998) (noting particularly efforts in Australia). For an example of a germinal American perspective, see Philip I. Blumberg, *Limited Liability and Corporate Groups*, 11 J. Corp. L. 573 (1986).

The tables have been turned on the state in another important way. From the perspective of the self-regulating corporation, the role of states has changed. No longer holders of a monopoly power to regulate the enterprise, states are now mere producers of a good—regulation—that can be characterized as a cost of operations. Like other operating costs, the costs of law can be modified or reduced through avoidance. Where the entity cannot avoid regulation, it is limited as regulation increases the price of goods. But where there is no monopoly on regulation, then avoidance, and the substitution of one legal regime for another becomes possible. In effect, entity and state have changed positions.

Self-regulation becomes more interesting when the sort of regulation that is sought focuses not on operations, but on governance. Governance regimes in the context of mobile corporations are no longer unavoidable assumptions constraining corporate actions. Instead, they are better understood as goods. “Once different national governance systems were understood as more than just way stations on the road to convergence, comparative scholars began to treat institutional differences as having competitive consequences. Competition was not just between products, but also between governance systems.”<sup>161</sup> Whether this leads to a global “Delaware effect” is still the subject of debate, as much about the existence of this effect is about its consequences for corporate decision making.<sup>162</sup> But the field of competition for consumption of regulation has now expanded beyond states and public law. While searching for an answer to the convergence issue in corporate law, commentators note the rise of alternative systems of regulation, either hybrid systems or regulatory systems based on private law that cut across borders.<sup>163</sup> From the perspective of a self-regulating corporation, this opens an even greater set of possibilities for fashioning an internal regulatory framework that suits it rather than any single political community seeking to assert exclusive regulatory authority.

Thus, that a multinational economic enterprise can be autonomous with respect to the state does not necessarily mean that the enterprise will always look to itself for the establishment of an enterprise-specific regulatory framework. As Gunther Teubner has suggested recently:

Grotius’ famous proposition *ubi societas ibi ius* has to be reformulated in the conditions of the functional differentiation of the planet in such a way that, wherever autonomous social sectors develop, autonomous law is simultaneously produced, at a relative distance from politics. Law-making also takes place outside the classical sources of international law, in agreements between global players, in private market regulation by multi-national concerns, internal regulations of international organisations, inter-organisational

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161. Ronald J. Gilson, *Globalizing Corporate Governance: Convergence of Form or Function*, 49 Am. J. Comp. L. 329, 330 (2001). Professor Gilson considered the power of corporate convergence and suggested that “[b]ecause the flexibility of governance and political institutions will differ not only between countries, but within individual countries based on the particular response called for by changed conditions, the most we can predict is substantial variation both across and within different national systems.” *Id.* at 337.

162. For a discussion of the complications of predicting the vector of change in corporate governance regulation when jurisdictions compete for corporate business by selling their corporate governance statutes in the United States, see Mark J. Roe, *Delaware’s Competition*, 117 Harv. L. Rev. 588 (2003).

163. See e.g. John C. Coffee, *The Future as History: The Prospects for Global Convergence in Corporate Governance and Its Implications*, 93 Nw. U. L. Rev. 641 (1999).



negotiating systems, world-wide standardisation processes that come about partly in markets and partly in the processes of negotiation among organisations.<sup>164</sup>

Multinational economic enterprise autonomy from the state has permitted the development of a set of regulatory frameworks for these enterprises outside the state. But such a regulatory system need not be independent of the mechanisms of state power. As the construction of the OECD regulatory system suggests, the autonomous enterprise can even develop its own institutional framework for self-regulation among the community of economic enterprises similarly situated in concert with states, now not so much as regulators, but instead as partners in the attainment of mutually beneficial goals. A recent example of this practice can be seen in the area of security and human rights.

The governments of the United States, the United Kingdom, Norway and the Netherlands plus companies operating in the extractive and energy sectors and non-governmental organizations, all with an interest in human rights and corporate social responsibility, have engaged in the dialogue on security and human rights and have collectively developed the Voluntary Principles.<sup>165</sup>

The mechanics of these *Voluntary Principles on Security and Human Rights* (“*Voluntary Principles*”) are coordinated by a secretariat jointly held by the International Business Leaders Forum and Business for Social Responsibility.<sup>166</sup> The *Voluntary Principles* suggest a set of guidelines for negotiating the contours of enterprise activity in the security sector.<sup>167</sup>

The more common form of autonomous self-regulation is the voluntary code framework that has proliferated in the international sphere since the last third of the twentieth century. Two examples of this form of self-regulation suggest the nature of this form of regulation. The first is the United Nation’s Global Compact,<sup>168</sup> a corporate citizen initiative centered on a self-regulating group of enterprises guided by the United Nations—the preeminent global political institution. The second is the related *Guide for Integrating Human Rights into Business Management* (“*Guide*”) developed by the Business Leaders Initiative on Human Rights.<sup>169</sup>

The Global Compact is a diluted version of the recently abandoned effort to implement the *Norms* as a more binding international law for the regulation of transnational corporations. In its own words:

164. Gunther Teubner, *Societal Constitutionalism: Alternatives to State-Centered Constitutional Theory?* in *Transnational Governance and Constitutionalism* 16 (Christian Joerges, Inger-Johanne Sand & Gunther Teubner eds., Hart Publg. 2004) (citing, among others, Robé, *supra* n. 141) (footnote omitted).

165. Intl. Bus. Leaders Forum & Bus. for Soc. Resp., *Voluntary Principles on Security & Human Rights*, <http://www.voluntaryprinciples.org/participants/index.php> (accessed July 23, 2006).

166. Intl. Bus. Leaders Forum & Bus. for Soc. Resp., *Voluntary Principles on Security & Human Rights*, <http://www.voluntaryprinciples.org/contact/index.php> (accessed July 23, 2006).

167. Intl. Bus. Leaders Forum & Bus. for Soc. Resp., *Voluntary Principles on Security & Human Rights*, <http://www.voluntaryprinciples.org/principles/index.php> (accessed July 23, 2006).

168. U.N. Global Compact, *Welcome to the United Nations Global Compact*, <http://www.unglobalcompact.org> (accessed July 23, 2006).

169. Bus. Leaders Initiative on Hum. Rights, *A Guide for Integrating Human Rights into Business Management*, <http://www.blihr.org/Pdfs/GIHRBM.pdf> (accessed July 23, 2006); see *supra* n. 157 and accompanying text.

Through the power of collective action, the Global Compact seeks to promote responsible corporate citizenship so that business can be part of the solution to the challenges of globalisation. In this way, the private sector—in partnership with other social actors—can help realize the Secretary-General's vision: a more sustainable and inclusive global economy.

The Global Compact is a purely voluntary initiative with two objectives:

- Mainstream the ten principles in business activities around the world
- Catalyse actions in support of UN goals

To achieve these objectives, the Global Compact offers facilitation and engagement through several mechanisms: Policy Dialogues, Learning, Country/Regional Networks, and Projects.

The Global Compact is not a regulatory instrument—it does not “police,” enforce or measure the behavior or actions of companies. Rather, the Global Compact relies on public accountability, transparency and the enlightened self-interest of companies, labour and civil society to initiate and share substantive action in pursuing the principles upon which the Global Compact is based.<sup>170</sup>

It should come as little surprise that the ten principles look suspiciously like the core provisions of the recently abandoned *Norms*. International institutions—unable to compel at the international level and unsuccessful in binding states to implement framework legislation that harmonizes and coordinates regulations—must cooperate with the objects of their regulation, transforming and cajoling the *Norms* into a voluntary conduct code.<sup>171</sup> For example,

[c]ompanies initiate their participation in the Global Compact through a leadership commitment by their CEO and (where appropriate) Board that is communicated to the United Nations. Business and other societal actors also engage directly in the various engagement mechanisms that the Global Compact offers at the global, regional and local level, such as practical solution finding, identification of good practices and projects on the ground.<sup>172</sup>

The *Guide* follows a similar approach. Like the United Nation's Global Compact initiative, the *Guide* seeks to provide a vehicle for the normalization of the practices developed in the now abandoned *Norms* through a program of voluntary practice. “Many of the companies that have contributed to this Guide, especially the companies involved in the [Business Leaders Initiative on Human Rights], agree that the content of the Draft Norms provides a helpful framework for human rights in business.”<sup>173</sup> The specific contribution of the *Guide* is to provide a “technical manual and a hands-on toolkit to help any company integrate practices consistent with human rights standards

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170. U.N. Global Compact, *What is the Global Compact?* <http://www.unglobalcompact.org/AboutTheGC/index.html> (accessed July 23, 2006).

171. The ten principles are divided into four groups: human rights, labor standards, environment, and anti-corruption. See U. N. Global Compact, *The Ten Principles*, <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html> (accessed July 23, 2006). To compare similar provisions in the now abandoned *Norms*, see Backer, *supra* n. 19, at 137–62.

172. U.N. Global Compact & OECD, *supra* n. 151, at 6.

173. Bus. Leaders Initiative on Hum. Rights, *supra* n. 157, at 4.

into an existing management system.”<sup>174</sup> The *Guide* is interesting as a form of voluntary regulation developed from collaborative efforts between communities of multinational enterprises and international institutional actors operating as partners, rather than as source and subject of regulation. The horizontal nature of their relationship, necessary for the production of this code and the code’s voluntary nature, suggest the extent of enterprise autonomy and the way in which new institutions are being developed for the regulation of increasingly autonomous entities.

The business of generating rules that serve as a substitute for traditional law making among the community of multinational enterprises and those actors, governmental and private, national and international—with a stake in their governance—has only continued to grow since the end of the last century. In addition to state-centered voluntary initiatives like the OECD *Guidelines*, a number of other actors have also sought to promote forms of voluntary trans-border regulation of behavior for economic enterprises. Some have been produced by other sectors of the international institutional community. For example, the International Labour Organization has produced the *ILO Declaration on Fundamental Principles and Rights at Work*, aimed at regulating the relationship between enterprises and their labor forces on a global basis.<sup>175</sup> Other non-state global players—for example, international human rights organizations like Amnesty International—have developed voluntary codes.<sup>176</sup> Another is the Sullivan Foundation’s<sup>177</sup> *Global Sullivan Principles of Social Responsibility* (“*Global Sullivan Principles*”),<sup>178</sup> endorsed by a large number of major economic enterprises.<sup>179</sup> The thrust of the *Global Sullivan Principles* is similar to that of the *Norms*—centering on the promotion of human rights, anti-subordination principles in the workplace, labor organization rights, and sensitivity to development issues in local communities based on a respect for the law.<sup>180</sup>

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174. *Id.* at 5.

175. Intl. Labour Org., *ILO Declaration on Fundamental Principles and Rights at Work*, <http://www.ilo.org/dyn/declaris/DECLARATIONWEB.INDEXPAGE> (accessed July 23, 2006).

176. See Amnesty Intl. Hum. Rights Principles for Cos., <http://web.amnesty.org/library/index/engACT700011998?open&of=eng-398> (accessed July 23, 2006).

177. Leon H. Sullivan Found., *Mission Statement*, <http://www.thesullivanfoundation.org/foundation/index.asp> (accessed July 23, 2006). The Mission Statement provides:

Our mission is to carry on the spirit and legacy of Reverend Leon H. Sullivan, the great African American international humanitarian, by leveraging the commitments and resources of the African Diaspora and Friends of Africa for positive change in the world. We do so by advocating for domestic and international issues that Rev. Sullivan dedicated his life to, by supporting the work of the organizations he founded, and by providing a platform for Africa’s political, economic and cultural leaders in the United States. Our work is guided by the principles that Rev. Sullivan championed: self-help, social responsibility, economic empowerment and human rights.

*Id.*

178. Leon H. Sullivan Found., *The Global Sullivan Principles of Social Responsibility*, <http://www.thesullivanfoundation.org/gsp/principles/gsp/default.asp> (accessed July 23, 2006).

179. For a list of endorsing companies, see Leon H. Sullivan Found., *Endorsers*, <http://www.thesullivanfoundation.org/gsp/endorsers/charter/default.asp> (accessed July 23, 2006).

180. Leon H. Sullivan Found., *supra* n. 177. The website explains “[t]he aspiration of the Principles is to have companies and organizations of all sizes, in widely disparate industries and cultures, working toward the common goals of human rights, social justice and economic opportunity.” Leon H. Sullivan Found., *Global Sullivan Principles*, <http://www.thesullivanfoundation.org/gsp/default.asp> (accessed July 23, 2006).

Many of these codes evidence the power of self-regulation within the community of multinational enterprises. Some originate within organizations serving economic enterprises themselves. These represent the glimmerings of the constitution of multinational enterprises as an autonomous community of entities that have begun to regulate themselves through the construction of systems of governance independent of the states. For example, institutional market organizations have developed voluntary codes aimed at multinational enterprises and others that access capital through their organizations.<sup>181</sup> Similarly, companies offering indexing services for enterprises seeking to participate in the capital markets have also produced voluntary codes and reporting systems designed to enhance business access to capital by compliance with its codes.<sup>182</sup> For example,

[t]he FTSE4Good Index Series has been designed to measure the performance of companies that meet globally recognised corporate responsibility standards, and to facilitate investment in those companies. Transparent management and criteria alongside the FTSE brand make FTSE4Good the index of choice for the creation of Socially Responsible Investment products.<sup>183</sup>

In addition to collaborative projects between economic enterprises and international institutions that result in regulation like the *Guide*, other aggregations of like-minded multinational economic enterprises have formed groups for the purpose of creating systems of self-regulation. An example is Social Accountability International, an American-based non-governmental organization<sup>184</sup> with representatives from a variety of economic entities that have developed a voluntary workplace standard for enterprises, the SA8000. Like the *Guide*, the SA8000 is “based on international workplace norms in the International Labour Organisation conventions and the Universal Declaration of Human Rights and the UN Convention on the Rights of the Child.”<sup>185</sup> Compliance-seeking companies can either have their facilities certified as SA8000 compliant or become part of a “Corporate Involvement Program.”<sup>186</sup> Institutionally, the organization acts as facilitator and conduit of information.<sup>187</sup> Another is the Caux

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181. See Dow Jones Sustainability Index, <http://www.sustainability-index.com> (accessed July 23, 2006).

182. See e.g. FTSE, *FTSE: The Index Company*, <http://www.ftse.com> (accessed July 23, 2006). “FTSE is an independent company owned by The Financial Times and the London Stock Exchange. Our sole business is the creation and management of indices and associated data services, on an international scale.” FTSE, *FTSE: The Index Company*, [http://www.ftse.com/About\\_Us/index.jsp](http://www.ftse.com/About_Us/index.jsp) (accessed July 23, 2006).

183. FSTE4Good Index Series, [http://www.ftse.com/Indices/FTSE4Good\\_Index\\_Series/index.jsp](http://www.ftse.com/Indices/FTSE4Good_Index_Series/index.jsp) (accessed July 23, 2006).

184. Soc. Accountability Intl., *SAI Governance Structure*, <http://www.sa-intl.org/index.cfm?fuseaction=Page.viewPage&pageId=594&parentID=472> (accessed July 23, 2006).

185. Soc. Accountability Intl., *Overview of SA8000*, <http://www.sa-intl.org/index.cfm?fuseaction=Page.viewPage&pageId=473> (accessed July 23, 2006).

186. *Id.*

187. Soc. Accountability Intl., *About Us*, <http://www.sa-intl.org/index.cfm?fuseaction=page.viewPage&PageID=472&C\FusionMX7\verity\Data\dummy.txt> (accessed July 23, 2006). The website states, *id.*:

SAI works with companies (such as the Gap, Inc., Co-op Italia, and Chiquita Brands International), consumer groups, non-governmental organizations (NGOs like Amnesty International and C.A.R.E.), labor organizations (which currently include a total of 15 million workers in their ranks), governmental agencies, and certification bodies around the world. SAI accredits the certification bodies for SA8000 auditing to ensure that workers receive the just and humane treatment they deserve.

Round Table, “an international network of principled business leaders working to promote a moral capitalism. The [Caux Round Table] advocates implementation of [its] Principles for Business through which principled capitalism can flourish and sustainable and socially responsible prosperity can become the foundation for a fair, free and transparent global society.”<sup>188</sup>

The voluntary regulation movement is important for a number of reasons unrelated to self-regulation. But in the context of my discussion, this movement strongly suggests that self-regulating behaviors can succeed without a significant social and political foundation. Recent scholarship has begun to suggest that a transnational class has been emerging that not only drives the shape and speed of globalization, but also manages globalization instrumentally through the transnational corporation.<sup>189</sup> Leslie Sklair

attempt[s] to show how a new class is emerging and how it pursues people and resources all over the world in its insatiable desire for private profit and eternal accumulation. This new class is the transnational capitalist class, composed of corporate executives, globalizing bureaucrats and politicians, globalizing professionals, and consumerist elites.<sup>190</sup>

Much of the analytical framework is grounded in a sophisticated reworking of traditional Marxist-Leninist critiques of its arch-nemesis—capitalism.<sup>191</sup> But that stance ought not to blind those skeptical to the value of Marxist-Leninism as ideology to the utility of the important insight of the rise of international networks of economic, political, and cultural elites who together can serve to provide a necessary protection for economic entities against the reach of the regulation of any one state. Building on the work of Pierre Bourdieu,<sup>192</sup> Sklair is right to conclude that the autonomy of multinational economic entities—what he characterizes as global capitalism—“is augmented with ownership and control of other types of capital, notably political, organizational, cultural, and knowledge capital.”<sup>193</sup>

Of course, significantly more empirical research is necessary to explore the contours of this new global class of individual actors connected through dense webs of economic, political, public, private, educational, and other institutional ties. But even the preliminary glance offered through this article suggests some important connections reinforcing enterprise autonomy. Thus, for example,

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188. Caux Round Table, *About Us*, <http://www.cauxroundtable.org/about.html> (accessed July 23, 2006).

189. See Leslie Sklair, *The Sociology of the Global System* (2d ed., Johns Hopkins U. Press 1995). “The building blocks of [global system] theory are the TNCs, the characteristic institutional form of economic transnational practices, the transnational capitalist class in the political sphere and in the culture-ideology sphere, the culture-ideology of consumerism.” Leslie Sklair, *The Transnational Capitalist Class* 4 (Blackwell Publ. 2001) [hereinafter Sklair, *Capitalist Class*].

190. Sklair, *Capitalist Class*, *supra* n. 189, at 4.

191. For a discussion of the Marxist-Leninist variant of this argument in the context of sovereign debt and its relationship to non-Marxist-Leninist anti-globalization stances, see Larry Catá Backer, *Ideologies of Globalization and Sovereign Debt: Cuba and the IMF*, 24 Pa. St. Intl. L. Rev. 497 (2006); see also R.J. Barry Jones, *Globalisation and Interdependence in the International Political Economy: Rhetoric and Reality* 23–30 (Printer Publishers 1995).

192. Pierre Bourdieu, *The State Nobility: Elite Schools in the Field of Power* (Lauretta C. Clough trans., Stanford U. Press 1996).

193. Sklair, *Capitalist Class*, *supra* n. 189, at 17 (citation omitted); see also J. Glassman, *State Power beyond the “Territorial Trap”*: *The Internationalization of the State*, 18 Pol. Geography 669–99 (1999).

[t]he Caux Round Table was founded in 1986 by Frederick Phillips, former President of Philips Electronics and Olivier Giscard d'Estaing, former Vice-Chairman of INSEAD [business school of management], as a means of reducing escalating trade tensions.

At the urging of Ryuzaburo Kaku, then Chairman of Canon, Inc., the [Caux Round Table] began focusing attention on the importance of global corporate responsibility in reducing social and economic threats to world peace and stability.<sup>194</sup>

Olivier Giscard D'Estaing, in turn, is a founding member of the World Future Council Initiative,<sup>195</sup> whose leadership includes members of a global economic and political elite,<sup>196</sup> the goal of which is "to challenge the short-term commercial thinking that currently has veto power over global decision-making."<sup>197</sup> Social Accountability International's SA8000 standard is implemented in coordination with a global web of consultants to industry.<sup>198</sup> The secretariat of the Voluntary Principles on Security and Human Rights organization includes the International Business Leaders Forum and the Business for Social Responsibility ("BSR"). The former "works with business, governments, international agencies and other stakeholders to create new partnerships that help both business and communities to flourish."<sup>199</sup>

The latter "acts as a trusted intermediary between business and civil society. While understanding business and serving its needs, BSR maintains strong relationships with other key stakeholders and opinion formers in the civic and public sectors."<sup>200</sup> Quite like Sklair's thesis, BSR also explains that it

is part of a growing global network of national organizations that promote awareness of [Corporate Social Responsibility ("CSR")] and provide business leaders with opportunities to collaborate and network with innovative managers across all industries, geographies and

194. Caux Round Table, *Founding*, <http://www.cauxroundtable.org/history.html> (accessed July 23, 2006).

195. The founding Councilors represented the business, political, and academic elite from the Middle East, Africa, South Asia, and Europe, and included Hafsati Abiola, Ibrahim Abouleish, Hans Peter Drr, Nicholas Dunlop, HRH Prince El Hassan Bin Talal, Olivier Giscard d'Estaing, Bianca Jagger, Manfred Max-Neef, Frances Moore-Lappe, Ahmedou Ould-Abdallah, Anita Roddick, Hermann Scheer, Vandana Shiva, Sulak Sivaraksa, and Beate Weber. World Future Council Initiative, *Founding Councilors*, <http://www.worldfuturecouncil.org/founding-councilors.htm> (accessed July 23, 2006).

196. World Future Council Initiative, *Values, Visions, Solutions*, <http://www.worldfuturecouncil.org/index.htm> (accessed July 23, 2006).

197. World Future Council Initiative, *Introduction*, <http://www.worldfuturecouncil.org/index.htm> (accessed July 23, 2006).

198. See Soc. Accountability Intl., *SA8000 Consultants*, <http://www.sa-intl.org/index.cfm?fuseaction=Page.viewPage&pageld=601&parentID=473> (accessed July 23, 2006) (listing thirteen global consultants "who have had training in the use of SA8000 and experience on advising companies on SA8000 implementation").

199. Intl. Bus. Leaders Forum, *About Us*, [http://www.iblf.org/about\\_us.jsp](http://www.iblf.org/about_us.jsp) (accessed Sept. 18, 2006). The International Business Leaders Forum "was formed in 1990 by The Prince of Wales as an international, business-led, not-for-profit membership organisation focused on responsible business and development." The Prince of Wales, *The Prince's Charities: IBLF*, [http://www.princeofwales.gov.uk/trusts/bus\\_forum.html](http://www.princeofwales.gov.uk/trusts/bus_forum.html) (accessed September 18, 2006). The Prince of Wales is president of a large multinational not-for-profit enterprise consisting of a group of charities.

14 of the 16 Charities were founded personally by The Prince. The group is the largest multi-cause charitable enterprise in the United Kingdom, raising over £100 million annually. The organisations are active across a broad range of areas including opportunity and enterprise, education, health, the built environment, responsible business, the natural environment and the arts.

The Prince of Wales, *The Prince's Charities*, <http://www.princeofwales.gov.uk/trusts/index.html> (accessed Sept. 18, 2006).

200. Bus. for Soc. Resp., *About BSR*, <http://www.bsr.org/Meta/About/index.cfm> (accessed July 23, 2006).

functions. BSR also works collaboratively with numerous other CSR, corporate citizenship and sustainability organizations throughout the world, such as Business in the Community in the U.K., the Council for Better Corporate Citizenship in Japan, CSR-Europe, Accion Empresarial in Chile, Instituto Ethos in Brazil, and MAALA in Israel. BSR is a founding member of EMPRESA, a network of CSR organizations in the Americas.<sup>201</sup>

An international network of state and non-state actors, creating ever more complex webs of regulatory mechanisms in which the territorial state is just another (though quite important) actor, reinforces the idea of enterprise autonomy—the growing reality of enterprises now in control of their assets, freed of their owners, and freed from any one set of regulations. It is the autonomous enterprise, rather than capital, labor, or the state, that now defines itself with reference to those stakeholders. A nexus of contract, but one in which the autonomous enterprise now plays a role every bit as important as the other stakeholders traditionally considered the sum of its parts.

## VI. CONCLUSION

This article introduces the construction of a theory of institutional autonomy from a century of debate about the nature of economic entities. The article first re-examined the asset partitioning ideas of Hansmann and Kraakman in the context of the multinational enterprise. It suggested that asset partitioning can be usefully understood as fleshing out the contours of the way in which organizational law shapes *enterprise autonomy for creditors*. The article then re-examined the corporate personality analysis of Iwai suggesting the possibility of *enterprise autonomy from shareholders* in a global context. The article then considered the perverse utility of the ancient territorial principle and the principle of regulatory hierarchy in the global context to suggest the possibility of *enterprise autonomy from the state*. Putting these three puzzle pieces together, the article concludes that the nexus of multinational enterprises and globalization provides a foundation for the emergence of self-conscious, autonomous, self-regulating economic enterprises.

Asset partitioning has made possible the organization of enterprises whose assets are autonomous of shareholders and reside in the enterprise. Realist capitalism has made it possible to organize corporations whose governance is autonomous of shareholders. With assets and governance vested in an organization independent of the individual stakeholders, the enterprise is subject only to the direct regulation of the state. Globalization has made the autonomous and self-regulating enterprise possible by reducing the power of state regulation of the entity. Enterprises freed of shareholder control and the nexus point of enterprise debt that can disperse regulatory control will have effectively achieved self-regulation. From an institutional perspective, the enterprise will have achieved a status that begins to resemble that of the state.

The current consequences of the rise of the self-regulating enterprise are already being felt in at least two respects. The first is evidenced by the growing movement for such enterprises to form regulatory communities. The rise of voluntary codes of conduct

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201. *Id.*

and other similar mechanisms of behavior regulation attest to the growing power of enterprises to free themselves from the regulation of states. The second is evidenced by the efforts of international political communities to attempt to substitute a global legal regulatory order for that of the states. The international community has already confronted the reality of a global economy in which autonomous, self-regulating entities wield enormous authority. The United Nation's human rights institutions have sought to impose an international legal regime on the regulation of enterprises whose asset and control dispersions (by distribution of capital and control on a worldwide basis through a controlled group of subsidiary enterprises) transcend national boundaries to the detriment of states and their citizens. These efforts have been unsuccessful. Diversification of debt permitted enterprises a certain independence from their creditors. Asset partitioning permitted enterprises to consolidate an institutional presence. Diversification of shareholding augmented the institutional power of the enterprise (and its managers) as against owners. That diversification permitted a certain (and sometimes almost complete) autonomy of enterprises from their owners. The dispersion of regulatory power among a number of states, like the dispersion of ownership, continues the process of enterprise institutional augmentation. That dispersion of regulatory power will significantly reduce the regulatory power of states and increase the autonomy of entities. The extent of the regulatory autonomy of enterprises will continue to be a significant issue.

This question in the twenty-first century is very different from that in the nineteenth or twentieth centuries. Today an economic enterprise can insulate its assets within itself. It can disperse its assets among enterprises—each an independent juridical person. It can exist independent of its shareholders. It can own itself. It can exist independent of the regulation of any singular political community. It can choose the set of regulations to which it wishes to subject clusters of assets. It can regulate itself. For the economic enterprise able to disperse assets and operations worldwide and access capital markets around the globe, the essential role of law of the economic organization appears to be to enhance the ability of the multinational economic enterprise to become an autonomous and self-regulating enterprise.



